132 (2)

No. 08-1379

Supreme Court, U.S.
FILED
JUL 7 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARNIE GONZALEZ,
AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CITY OF DEERFIELD BEACH, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons for the Court to grant the Petition for Writ of Certiorari where the Eleventh Circuit's opinion is consistent with every court of appeals decision involving similar facts and the Eleventh Circuit affirmed the District Court's determination that, based on the factual record before it, all of the Petitioners were exempt within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(y) because Petitioners had been trained in fire suppression, could be required to engage in fire suppression or face disciplinary action, and had the responsibility to engage in fire suppression.

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STATEMENT OF THE CASE

Petitioners failed to mention one of the most crucial facts in the record below:

> It is true that there are many similarities between the *Cleveland* plaintiffs' jobs and the jobs of the plaintiffs here; but the most important factor present in *Huff* – and present here – was absent in *Cleveland*: there, unlike here, the plaintiffs could not be ordered to engage in fire suppression; they could *volunteer* to assist firefighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so. (Emphasis in original).

Pet. App. 9a.

REASONS FOR DENYING THE PETITION

Petitioners presented no compelling reasons for their Petition for a Writ of Certiorari to be granted. Specifically, Petitioners failed to demonstrate that the Eleventh Circuit's November 24, 2008 Opinion ("Opinion") is in conflict with either a decision of this Court or that of any Court of Appeals. As discussed in detail below, there is no conflict between the Opinion and any other Court of Appeals. Accordingly, there is no reason for review by this Court. The Opinion correctly applied the Fair Labor Standards Act ("FLSA") to the facts of this case.

I. Distinct Facts, Not Legal Interpretation, Are the Reasons for Different Results.

Every court which has addressed this issue has interpreted the word "responsibility" in the exact same manner. *Huff v. DeKalb County*, 516 F.3d 1273, 1279 (11th Cir. 2008); *Gonzalez v. City of Deerfield Beach*, 549 F.3d 1331, 1334 (11th Cir. 2008); *Lawrence v. City of Philadelphia*, 527 F.3d 299, 312-14 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 763 (2008); *Cleveland v. City of Los Angeles*, 420 F.3d 981, 989 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006). All the courts have noted that the responsibility requirement of the statute means that the plaintiffs must "have some real obligation or duty" to engage in fire suppression. *Huff*, 516 F.3d at 1279; *Gonzalez*, 549 F.3d at 1334; *Lawrence*, 527 F.3d at 314; *Cleveland*, 420 F.3d at 989. The cases reach different results due to the fact that some EMTs/fire fighters could be required to fight fires if ordered to do so, and some could not. *Huff*, 516 F.3d at 1275; *Gonzalez*, 549 F.3d at 1335; *Lawrence*, 527 F.3d at 307; *Cleveland*, 420 F.3d at 984. All the courts that have addressed the issue have applied the common every day meaning of the word "responsibility." *Huff*, 516 F.3d at 1279; *Gonzalez*, 549 F.3d at 1334; *Lawrence*, 527 F.3d at 314; *Cleveland*, 420 F.3d at 989. As the various circuit courts have noted, there have been varying results due to varying facts. *See Huff*, 516 F.3d at 1279; *Gonzalez*, 549 F.3d at 1334-36; *Lawrence*, 527 F.3d at 314-16; *Cleveland*, 420 F.3d at 990. That is to be expected and does not lead to the necessity of review

by this Court. If it did, this Court would be forever bogged down in factual disputes instead of legal conflicts between the circuits. Not one Court of Appeals has determined itself to be in conflict with any other court on this issue.

A. There Is Not a Split in Court of Appeals Decisions.

Respondent concedes that upon first reviewing the cases, it might appear that there is a conflict between *Lawrence* and *Cleveland*, on the one hand, and *Huff* and *Gonzalez*, on the other hand. This is because in *Lawrence* and *Cleveland*, the fire fighters prevailed, but in *Huff* and *Gonzalez*, as well as in *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006), the municipalities prevailed. However, upon studied analysis, and considering the different facts in the respective cases, it becomes clear that there is no conflict in these cases. The fire fighters prevailed in *Lawrence* and *Cleveland* not because those courts had a different view of § 203(y) than did the courts in *Gonzalez* or *Huff*. Rather, the courts in those cases where the fire fighters prevailed were dealing with facts which included EMTs and paramedics which were never called upon or expected to fight fires and would not be disciplined for refusing to fight fires. *Lawrence*, 527 F.3d at 307; *Cleveland*, 420 F.3d at 984. In contrast, the paramedics and EMTs in *Gonzalez* and *Huff* had training in fire suppression, could be called upon to engage in fire suppression, and could be disciplined if they refused

to engage in fire suppression. *Huff*, 516 F.3d at 1275; *Gonzalez*, 549 F.3d at 1335. Due to these divergent facts, the *Gonzalez* and *Huff* cases were decided one way, and *Cleveland* and *Lawrence* another.

The common factors in *Gonzalez* and *Huff* are that (1) the paramedics and EMTs had training in fire suppression, (2) were certified fire fighters that could be called upon to engage in fire suppression, and (3) could be disciplined if they refused to engage in fire suppression. In both *Lawrence* and *Cleveland*, the reputed conflicting cases, not only were the paramedics and EMTs not called upon or expected to fight fires, but they could not be disciplined for doing so. *Lawrence* and *Cleveland* have disparate fact patterns from the case at issue and the other Court of Appeals decisions.

Simply stated, there is no split in the circuits. Rather, the courts have obtained different results due to the different facts presented in the several cases. There is not a single decision where another circuit court actually conflicted with the Opinion of the Eleventh Circuit below. There is no need to grant Certiorari.

B. The Issue of Overtime Compensation Under the FLSA Has Always Been a Fact Specific Inquiry.

Determining who is required to be paid overtime and who may be exempted under any of the many exemptions contained in the FLSA is, and has always

been, a fact specific inquiry. *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132-33 (1945). When the specific facts of each of the cases mentioned by Petitioners as being in conflict are examined, it becomes apparent that each of the cases is factually unique and that there is no conflict. The opinions cited by Petitioners are in harmony when one looks at the underlying facts of the individual cases.

C. The Facts of the *Lawrence* and *Cleveland* Cases Contrast with the *Gonzalez* Case Which Resulted in Different Conclusions.

Petitioners erroneously claim that the Opinion conflicts with the decisions of *Lawrence* and *Cleveland*. Petitioners' various errors begin on page 3 of their Petition, wherein Petitioners state that the action against the City of Deerfield Beach was filed in the District Court for the Southern District of Florida in 1996. In fact, Petitioner Gonzalez filed this action against the Respondent, the City of Deerfield Beach, on September 1, 2006. Pet. App. 12a. Though Petitioners were off by 10 years, this is the most inconsequential error of Petitioners'. What is more important is that Petitioners fail to acknowledge that there are dispositive facts present in this case which were absent in both *Cleveland* and *Lawrence*. A brief review of those decisions is instructive.

In *Cleveland*, the Plaintiffs could not be ordered to engage in fire suppression. *Cleveland*, 420 F.3d at

984. They could *volunteer* to assist fire fighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so. *Id.*

Similarly, the facts in *Lawrence* were fundamentally different from the facts in this case. Not all of the Plaintiffs in *Lawrence* were certified fire fighters. As the Court of Appeals in *Lawrence* noted:

> "There is no dispute that the Appellants are not fully cross-trained or dual function fire fighters/paramedics. The FSPs have not received advanced fire fighter training. They are not certified fire fighters." *Id.* at 315.

Furthermore, in *Lawrence*, there was no evidence that any of the plaintiffs could be penalized for refusing to fight a fire. *Id.* at 317. As the Court of Appeals stated in *Lawrence*:

> "There is no evidence in the record to support the assertion that the FSPs are expected to engage in fire suppression as part of their job duties or that they are subject to penalty if they do not do so." *Id.* at 317.

In *Lawrence*, the City was unable to cite a single instance in which an FSP was called upon to enter a burning building to put out a fire or was expected to perform any fire suppression duty other than a few marginal instances involving nothing more than moving a hose line. *Id.* at 306. The *Lawrence* Court noted that the City contended that there was no record evidence of *any* formal reprimand of FSPs for

performing fire suppression duties. *Id.* at 307. (Emphasis added).

Contrasting the *Lawrence* facts with this case, all Plaintiffs are trained and certified as fire fighters. Pet. App. 3a. Moreover, Plaintiffs admitted that they would be subject to significant discipline if they refused to obey an order to engage in fire suppression. Pet. App. 3a. Indeed, it was undisputed in the record below that when a commanding officer ordered any of the Plaintiffs to engage in fire suppression, that the Plaintiffs had the responsibility to do that or face discipline upon failure to follow such an order. Pet. App. 14a. The completely dissimilar facts in the Opinion versus those in *Lawrence* resulted in rulings in each case that are applicable to the unique facts of each case. The interpretation of the FLSA was consistent and there is no conflict between the two cases. None of the courts pronounced an interpretation of § 203(y) that conflicts with a pronouncement of any other.

In *Lawrence*, the City contended that there was no record evidence of any formal reprimand of FSPs for performing fire suppression duties. *Id.* at 307. There was additional evidence in *Lawrence* that if any officer ordered an FSP to assist with fire suppression efforts, the *officer*, not the employee, would have been subject to discipline. *Id.*

There was only limited evidence in *Lawrence* that there had been any incidents of FSPs helping fire fighters at a fire scene. It was all voluntary. This type

of "voluntary assistance" is known as "freelancing." *Id.* The record establishes that the department did not encourage freelancing. *Id.* It is unclear whether the "freelancing" was prohibited by the fire department. "There is some evidence that freelancing was against the standing rules of the department and was not condoned." *Id.* Most importantly, there is no evidence of an FSP being disciplined for not engaging in fire suppression activities at a fire scene. *Id.* at 317.

Lawrence and *Gonzalez* presented the respective courts with vastly different operative facts. On the face of the cases different results seem to have been reached; however, an examination of the cases reveals that the different outcomes are based on different facts and that the cases do not conflict in their interpretation of the FLSA. Similarly, the facts in *Cleveland* are drastically different from those in the Opinion. It is the distinct facts, not a disagreement or conflict of law, that led to the disparate results in the two cases.

D. The Opinion Does Not Conflict with Decisions of Every Other United States Court of Appeals.

Another error made by Petitioners is their contention, made in their Petition for Rehearing En Banc and repeated here, (Petition, p. 5-6) that "this proceeding presents a question of exceptional importance because 'it involves an issue on which the panel

decision conflicts with the authoritative decisions of *every other* United States Court of Appeals that has addressed the issue.'" (Emphasis added). This statement is simply not true. The United States Court of Appeals for the Fifth Circuit issued an opinion which addressed this issue in *McGavock*. *McGavock*, a case ignored by the Petitioners, is not in conflict with the Opinion.

McGavock and the Opinion reach identical results – a decision in favor of the municipalities and against the fire fighters and EMTs. Yet Petitioners claim the Opinion is in conflict with the decision of "every other United States Court of Appeals that has addressed the issue." Petitioners have clearly misstated the situation. The Fifth Circuit in *McGavock* ruled against the employee plaintiffs and in favor of the City, finding that the plaintiffs were employees "engaged in fire protection activities" and thereby exempt from the coverage of the overtime provisions of the FLSA. The *McGavock* court found, just as did the court below, that the plaintiffs had the legal authority to engage in fire suppression and were actually called upon to extinguish, control and prevent fires and to respond to emergency situations where life, property or the environment were at risk, even though fire fighters spent more than 20% of their workweek engaged in dispatching duties, as opposed to actual fire protection activities. Clearly, *McGavock* is another case that has addressed § 203(y), which is not in conflict with the Opinion.

Respondent cannot explain why Petitioners failed to advise the Court of this plainly relevant authority.

The fire fighter cases involving the FLSA are not in conflict. The courts finding, based on the facts, that their respective plaintiffs had the responsibility to engage in fire fighting activity ruled that plaintiffs were exempt pursuant to § 203(y). Those cases wherein the plaintiffs did not have the responsibility to engage in fire fighting activity, such as *Cleveland* and *Lawrence*, were decided the other way. Thus, the FLSA exemption has been applied consistently across the circuits. The Ninth and Third Circuits simply considered plaintiffs that did not fight fires, were not allowed to fight fires, could not be disciplined for not fighting fires, and thus were not exempt from FLSA.

The *McGavock* court did note that the Plaintiffs were all engaged in fire fighting activity, though some of the plaintiffs spent more than 20% of their work-week engaged in dispatching duties as opposed to actual fire protection activities. *McGavock*, 452 F.3d at 424. *Huff*, *Gonzalez* and *McGavock* all differ factually from *Lawrence* because, in *Lawrence*, the court found that the plaintiffs not only were never expected or called upon to perform any fire suppression duties, but that if an officer ordered an FSP to assist with fire suppressant efforts the officer could be disciplined. *Lawrence*, 527 F.3d at 307.

In *Cleveland*, the court found that some of the plaintiffs were single function paramedics that were not even trained in fire protection and that even the

cross trained fire fighter paramedics in that case did not carry firefighting equipment, and were expected to perform only medical services. In *Cleveland*, the court found that the plaintiffs had no real obligation or duty to fight fires. Unlike *Lawrence* and *Cleveland*, the Plaintiffs below could be ordered to engage in fire suppression and could be disciplined for failing to follow such an order. Pet. App. 9a. Accordingly, the lower courts are remarkably consistent with their interpretations and application of the exemption. If an individual has the responsibility to engage in fire suppression, he or she is exempt. If not, he or she is not exempt.

The question presented does not require the attention of this Court. The Petitioners attempt to create a scenario wherein there are conflicts among the circuits by focusing on different results while ignoring the different facts. Petitioners do not address the issue of different fact patterns which have resulted in different rulings. Factual distinctions do not merit this Court's attention.

II. Review Is Not Warranted to Resolve Conflict as There Is No Conflict and the Court Below Correctly Relied on the Facts of the Case and the Rules of Statutory Interpretation.

The decision of the Eleventh Circuit in *Gonzalez* is consistent with the precedent regarding the interpretation of statutes. The Court of Appeals

properly followed the relevant decisions of this Court on statutory interpretation. Interpretation of the meaning of statutes always starts with the words of the law itself. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). There is no definition of the word "responsibility" in § 203(y). A fundamental principle of statutory construction is that if a word is not defined, the word will be interpreted as having its ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

Using the ordinary dictionary meaning of the word "responsibility," the Court of Appeals in *Gonzalez* determined that, based on the facts, the District Court properly concluded that the City met its burden of showing that the Plaintiffs had the responsibility to engage in fire suppression. Whereas § 203(y) can be read using the ordinary and common meaning of the words contained in the statute, there is no reason

to go beyond the regular "plain language" definition of the word "responsibility" in the statute.

> We further held that the ordinary meaning of the term "responsibility" "does not imply any actual engagement in fire suppression," and that "employees may have a 'responsibility to engage in fire suppression' without ever actually engaging in fire suppression themselves." . . . This responsibility, we further explained, is a forward looking, affirmative duty or obligation that an employee may have at some point in the future.

Gonzalez, 549 F.3d at 1334 (citing *Huff*, 516 F.3d at 1281).

Since the court below relied on the ordinary meaning of the term "responsibility," the Eleventh Circuit Opinion obeyed the canons of construction laid down by this Court. Both the Eleventh Circuit's interpretation of the facts and the statutory exemption are consistent with this Court's prior guidance. There is no need to grant certiorari. There is not a single case of conflict with regard to § 203(y).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 2009